STATE OF ALASKA

Legislative Affairs Agency

A

REPORT TO THE

TWENTY-FOURTH STATE LEGISLATURE

Listing Alaska Statutes with
Delayed Repeals or Delayed Amendments
and
Examining Court Decisions
and Opinions of the
Attorney General
Construing Alaska Statutes

Prepared by
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State Capitol
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DECEMBER 2005

A REPORT TO THE TWENTY-FOURTH STATE LEGISLATURE

Listing Alaska Statutes with Delayed Repeals or Delayed Amendments and Examining Court Decisions and Opinions of the Attorney General Construing Alaska Statutes

The report lists Alaska Statutes that will be amended or repealed between March 1, 2006, and March 1, 2007, according to laws enacted before the 2006 legislative session.

The report also examines published cases construing Alaska Statutes that were decided by the courts and reported between October 1, 2004, and September 30, 2005,

and

Opinions of the Attorney General that were made available through Internet distribution between October 1, 2004, and September 30, 2005.

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INTRODUCTION

AS 24.20.065(a) requires that the Legislative Council annually examine administrative regulations, published opinions of state and federal courts and of the Department of Law that rely on state statutes, and final decisions adopted under the Administrative Procedure Act (AS 44.62) to determine whether or not

(1) the courts and agencies are properly implementing legislative purposes;

(2) there are court or agency expressions of dissatisfaction with state statutes;

(3) the opinions or regulations indicate unclear or ambiguous statutes;

(4) the courts have modified or revised the common law of the state.

Under AS 24.20.065(b) the Council is to make a comprehensive report of its findings and recommendations to the members of the Legislature at the start of each regular session.

This edition of the review by the attorneys of the Legislative Affairs Agency examines the opinions of the Alaska Supreme Court, the Alaska Court of Appeals, the United States Court of Appeals for the Ninth Circuit, and the United States District Court for the District of Alaska. As in the past, those cases where the court construes or interprets a section of the Alaska Statutes are analyzed. Those cases where no statute is construed or interpreted or where a statute is involved but it is applied without particular examination by the court are not reviewed. In addition, those major cases that have already received legislative scrutiny are not analyzed. However, cases that reject well-established common law principles or reverse previously established case law that might be of special interest to the legislature are analyzed. Because the purpose of the report is to advise members of the legislature on defects in existing law, we have generally not analyzed those cases where the law, though it may have been criticized, has been changed since the decision or opinion was published.

The formal and informal opinions of the Attorney General are also reviewed. As with court opinions, we have only analyzed those opinions where a provision of the Alaska Statutes is construed or interpreted, or which might otherwise be of special interest to the legislature.

The review of administrative regulations is the responsibility of the Administrative Regulation Review Committee under AS 24.20.460 and is not included within this review.

This report also includes a list of Alaska Statutes that, absent any action by the 2006 Legislature, will be repealed or amended before March 1, 2007, because of repealers or amendments enacted by previous legislatures with delayed effective dates.

The review of state court decisions was prepared by Jerry Luckhaupt and Jean Mischel, Legislative Counsel. The review of the federal court decisions, Opinions of the Attorney General and the list of delayed repeals and amendments were prepared by James Crawford, Assistant Revisor of Statutes, and Don Bullock, Legislative Counsel. Both reviews and preparation of the list were undertaken under the general direction of Tamara Brandt Cook, Director of the Division of Legal and Research Services, Legislative Affairs Agency.

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DELAYED REPEALS, ENACTMENTS OR AMENDMENTS

taking effect between March 1, 2006, and March 1, 2007 according to laws enacted before the 2006 legislative session

Laws Enacted in 1998

Ch. 129, SLA 1998 -- AHFC Bonding Authority

Sec. 1, ch. 129, SLA 1998	repealed effective 7/1/2006
Sec. 2, ch. 129, SLA 1998	repealed effective 7/1/2006

Laws Enacted in 2002

Ch. 102, SLA 2002 -- Municipal Property Tax on Certain Property

AS 29.45.050(o)	repealed effective 7/1/2006

Laws Enacted in 2003

Ch. 51, SLA 2003 -- State Procurement Pilot Program

Sec. 2, ch. 51, SLA 2003	repealed effective 7/1/2006

Laws Enacted in 2005

Ch. 31, SLA 2005 -- Alaska Coastal Management Program

AS 09.45.230(b)	amended (conditionally) effective 5/10/2006
AS 16.43.160(e)	amended (conditionally) effective 5/10/2006
AS 37.10.058(2)	amended (conditionally) effective 5/10/2006
AS 37.10.058(7)	amended (conditionally) effective 5/10/2006
AS 38.05.035(e)	amended (conditionally) effective 5/10/2006
AS 38.05.945(d)	amended (conditionally) effective 5/10/2006
AS 41.17.900(d)	amended (conditionally) effective 5/10/2006
AS 41.17.900(e)	repealed (conditionally) effective 5/10/2006
AS 41.21.492(b)	amended (conditionally) effective 5/10/2006
AS 41.21.504(b)	amended (conditionally) effective 5/10/2006
AS 41.23.420(d)	amended (conditionally) effective 5/10/2006
AS 44.33.781	repealed (conditionally) effective 5/10/2006
AS 44.33.788	amended (conditionally) effective 5/10/2006
AS 44.33.790	amended (conditionally) effective 5/10/2006
AS 44.33.844	amended (conditionally) effective 5/10/2006
AS 46.39.010	repealed (conditionally) effective 5/10/2006
AS 46.39.030	repealed (conditionally) effective 5/10/2006
AS 46.39.040	repealed (conditionally) effective 5/10/2006
AS 46.39.900	repealed (conditionally) effective 5/10/2006
AS 46.40.010	repealed (conditionally) effective 5/10/2006
AS 46.40.020	repealed (conditionally) effective 5/10/2006
AS 46.40.030	repealed (conditionally) effective 5/10/2006
AS 46.40.040	repealed (conditionally) effective 5/10/2006
AS 46.40.050	repealed (conditionally) effective 5/10/2006

AS 46.40.060	repealed (conditionally) effective 5/10/2006
AS 46.40.070	repealed (conditionally) effective 5/10/2006
AS 46.40.090	repealed (conditionally) effective 5/10/2006
AS 46.40.094	repealed (conditionally) effective 5/10/2006
AS 46.40.096	repealed (conditionally) effective 5/10/2006
AS 46.40.100	repealed (conditionally) effective 5/10/2006
AS 46.40.110	repealed (conditionally) effective 5/10/2006
AS 46.40.140	repealed (conditionally) effective 5/10/2006
AS 46.40.150	repealed (conditionally) effective 5/10/2006
AS 46.40.180	repealed (conditionally) effective 5/10/2006
AS 46.40.190	repealed (conditionally) effective 5/10/2006
AS 46.40.195	repealed (conditionally) effective 5/10/2006
AS 46.40.205	repealed (conditionally) effective 5/10/2006
AS 46.40.210	repealed (conditionally) effective 5/10/2006

NOTE: The condition relating to the amendment or repeal of these sections is set out in sec. 22 of ch. 31, SLA 2005.

Ch. 53, SLA 2005 -- Compensation of Government Officers and Employees

AS 39.20.010(a)	amended effective 12/4/2006
AS 39.20.030(a)	amended effective 12/4/2006
AS 39.20.010(b)	repealed effective 12/4/2006
AS 39.20.010(c)	repealed effective 12/4/2006
AS 39.20.030(b)	repealed effective 12/4/2006
AS 39.20.030(c)	repealed effective 12/4/2006

Ch. 57, SLA 2005 -- Certain Care Facilities and Persons at Those Facilities

AS 44.62.330(a)(45)	enacted (conditionally) effective 3/1/2006
AS 47.05.300	enacted (conditionally) effective 3/1/2006
AS 47.05.310	enacted (conditionally) effective 3/1/2006
AS 47.05.320	enacted (conditionally) effective 3/1/2006
AS 47.05.330	enacted (conditionally) effective 3/1/2006
AS 47.05.340	enacted (conditionally) effective 3/1/2006
AS 47.05.350	enacted (conditionally) effective 3/1/2006
AS 47.05.390	enacted (conditionally) effective 3/1/2006
AS 47.32.010(c)	enacted (conditionally) effective 3/1/2006

NOTE: The condition relating to the enactment of these sections is set out in sec. 62 of ch. 57, SLA 2005.

AS 14.25.008(1)	amended effective 7/1/2006
AS 14.25.040(a)	amended effective 7/1/2006
AS 14.25.310	enacted effective 7/1/2006
AS 14.25.320	enacted effective 7/1/2006
AS 14.25.330	enacted effective 7/1/2006
AS 14.25.340	enacted effective 7/1/2006
AS 14.25.345	enacted effective 7/1/2006
AS 14.25.350	enacted effective 7/1/2006
AS 14.25.360	enacted effective 7/1/2006
AS 14.25.370	enacted effective 7/1/2006
AS 14.25.380	enacted effective 7/1/2006
AS 14.25.390	enacted effective 7/1/2006
AS 14.25.400	enacted effective 7/1/2006
AS 14.25.410	enacted effective 7/1/2006
AS 14.25.420	enacted effective 7/1/2006
AS 14.25.430	enacted effective 7/1/2006
AS 14.25.440	enacted effective 7/1/2006
AS 14.25.450	enacted effective 7/1/2006
AS 14.25.460	enacted effective 7/1/2006
AS 14.25.470	enacted effective 7/1/2006
AS 14.25.480	enacted effective 7/1/2006
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AS 14.25.490	enacted effective 7/1/2006
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AS 14.25.530	enacted effective 7/1/2006
AS 14.25.540	enacted effective 7/1/2006
AS 14.25.550	enacted effective 7/1/2006
AS 14.25.560	enacted effective 7/1/2006
AS 14.25.570	enacted effective 7/1/2006
AS 14.25.580	enacted effective 7/1/2006
AS 14.25.590	enacted effective 7/1/2006
AS 14.40.671(e)	amended effective 7/1/2006
AS 14.40.799(3)	amended effective 7/1/2006
AS 37.10.220(a)	amended effective 7/1/2006
AS 39.30.090(a)	amended effective 7/1/2006
AS 39.30.300	enacted effective 7/1/2006
AS 39.30.310	enacted effective 7/1/2006
AS 39.30.320	enacted effective 7/1/2006
AS 39.30.330	enacted effective 7/1/2006
AS 39.30.340	enacted effective 7/1/2006
AS 39.30.350	enacted effective 7/1/2006
AS 39.30.360	enacted effective 7/1/2006
AS 39.30.370	enacted effective 7/1/2006
AS 39.30.380	enacted effective 7/1/2006

AS 39.30.390	enacted effective 7/1/2006
AS 39.30.400	enacted effective 7/1/2006
AS 39.30.410	enacted effective 7/1/2006
AS 39.30.420	enacted effective 7/1/2006
AS 39.30.430	enacted effective 7/1/2006
AS 39.30.495	enacted effective 7/1/2006
AS 39.35.008(2)	amended effective 7/1/2006
AS 39.35.700	enacted effective 7/1/2006
AS 39.35.710	enacted effective 7/1/2006
AS 39.35.720	enacted effective 7/1/2006
AS 39.35.730	enacted effective 7/1/2006
AS 39.35.740	enacted effective 7/1/2006
AS 39.35.750	enacted effective 7/1/2006
AS 39.35.760	enacted effective 7/1/2006
AS 39.35.770	enacted effective 7/1/2006
AS 39.35.780	enacted effective 7/1/2006
AS 39.35.790	enacted effective 7/1/2006
AS 39.35.800	enacted effective 7/1/2006
AS 39.35.810	enacted effective 7/1/2006
AS 39.35.820	enacted effective 7/1/2006
AS 39.35.830	enacted effective 7/1/2006
AS 39.35.840	enacted effective 7/1/2006
AS 39.35.850	enacted effective 7/1/2006
AS 39.35.860	enacted effective 7/1/2006
AS 39.35.870	enacted effective 7/1/2006
AS 39.35.880	enacted effective 7/1/2006
AS 39.35.890	enacted effective 7/1/2006
AS 39.35.892	enacted effective 7/1/2006
AS 39.35.895	enacted effective 7/1/2006
AS 39.35.900	enacted effective 7/1/2006
AS 39.35.910	enacted effective 7/1/2006
AS 39.35.920	enacted effective 7/1/2006
AS 39.35.930	enacted effective 7/1/2006
AS 39.35.940	enacted effective 7/1/2006
AS 39.35.950	enacted effective 7/1/2006
AS 39.35.955	enacted effective 7/1/2006
AS 39.35.960	enacted effective 7/1/2006
AS 39.35.965	enacted effective 7/1/2006
AS 39.35.970	enacted effective 7/1/2006
AS 39.35.990	enacted effective 7/1/2006
Sec. 134, ch. 9, FSSLA 2005	enacted effective 7/1/2006

PLEASE NOTE: Additional delayed "sunset" of boards and commissions occurs under AS 08.03.010 and AS 44.66.010. Those "sunsets" are not reflected in the list above. Also not listed above are appropriations, and repeals that have been delayed to allow for an orderly transition to new law, such as when a new versions of a uniform act is enacted and the repeal of the old version of the uniform act is delayed a year or two.

ANALYSIS OF COURT CASES AND OPINIONS OF THE ATTORNEY GENERAL

PUBLIC PRESCRIPTIVE EASEMENT CAN BE ASSERTED BY AN ORGANIZATION AND CAN BE ESTABLISHED BY PROOF OF CONTINUOUS USE BY THE PUBLIC IN GENERAL.

The Alaska Supreme Court held that a plaintiff may establish a public prescriptive easement by proof there has been continuous use by the public in general for the prescriptive period. The plaintiff does not have to prove that the use was by the plaintiff, or if the plaintiff is an organization, the organization does not have to prove that the use was by the organization itself or by any individual member.

Interior Trails Preservation Coalition v. Swope, 115 P.3d 527 (Alaska 2005)

Legislative review is not recommended.

1st & 14th Am., U.S. Constitution

PRISONER MUST PRESENT EVIDENCE OF RETALIATORY CONDUCT IN ORDER TO REBUT PRISON'S UNCONTROVERTED EVIDENCE THAT DISCIPLINARY RESTRICTIONS WERE IMPOSED FOR LEGITIMATE REASONS.

Larson was an inmate of the Spring Creek Correctional Center. Larson was restricted to no contact visitation and he objected to this restriction by filing a prison grievance which was denied. Larson's contact visitation privileges were restored after 73 days. Larson later filed suit against correctional officials arguing that the officials had violated his constitutional rights by imposing the visitation restriction in retaliation for Larson's exercise of his religious rights and for other reasons. The state on behalf of the corrections officials moved for summary judgment which was granted by the superior court. The Alaska Supreme Court found that, when a prisoner asserts a retaliation claim, the prisoner must present evidence that the reasons for the disciplinary measures were pretextual, that the prison's actions were determined by a retaliatory motive, or other evidence supporting the claim of

retaliation. Since Larson did not present any such evidence, summary judgment was proper.

Larson v. Cooper, 113 P.3d 1196 (Alaska 2005)

Legislative review is not recommended.

4th Am., U.S. Constitution

EVIDENCE SEIZED FOLLOWING A SEARCH CONDUCTED AFTER THE EXECUTION OF AN ARREST WARRANT DISCOVERED AFTER AN ILLEGAL STOP.

The Alaska Court of Appeals found that the superior court acted properly in failing to exclude evidence found during a search incident to arrest. The search incident to arrest was occasioned by an arguably illegal stop of McBath. While holding McBath, the police discovered an outstanding warrant for his arrest and placed McBath under arrest. A search was then conducted and methamphetamine was found, leading to McBath's conviction for possessing the methamphetamine.

McBath v. State, 108 P.3d 214 (Alaska App. 2005)

Legislative review is not recommended.

Art. I, sec. 5, Constitution of the State of Alaska
AS 15.25.010
AS 15.25.014
AS 15.25.060

PROHIBITION ON COMBINED BALLOTS IN THE PRIMARY ELECTION SYSTEM IS UNCONSTITUTIONAL.

Political parties challenged the state's 2001 revision of the primary system. The revision had the effect of requiring each voter to choose one ballot and participate in only one party's primary, and of prohibiting a voter from participating in different political parties' primaries for different political offices. The Alaska Supreme Court held that the element of the revised system that required each political party to have a separate ballot and that denied the parties the opportunity to have a combined ballot violated the associational rights of political parties under Article I, sec. 5 of the state constitution.

State, Alaska Division of Elections v. Green Party of Alaska, et.al., 118 P.3d 1054 (Alaska 2005).

Legislative review is recommended to remove the statutory prohibition on combined ballots.

Art. I, sec. 7, Constitution of the State of Alaska
AS 47.07.070(a)

DEPARTMENT OF HEALTH AND SOCIAL SERVICES REGULATION CALCULATING MEDICAID REIMBURSEMENT RATES VIOLATED A HOSPITAL'S DUE PROCESS RIGHTS.

The Department of Health and Social Services acted arbitrarily and capriciously when it applied its new regulation for calculating Medicaid reimbursement rates to Valley Hospital by requiring the calculation to be based upon information the department knew to be inaccurate. The court compared the statute that required the department to base Medicaid reimbursement on a "fair rate for reasonable costs" incurred by a health care facility to the regulation that required the use of an historically inaccurate cost estimate to find that the statutory mandate and due process protections were not met in at least this one case. Avoiding a decision to invalidate the regulation on constitutional grounds, the court held that a regulation that allowed the department to significantly underestimate most facilities' reasonable costs would, absent sufficient justification, be constitutionally infirm. Since the case did not involve evidence of other facilities' calculations, the court declined to invalidate the regulation.

Department of Health and Social Services v. Valley Hospital Association, 116 P.3d 580 (Alaska 2005)

Legislative review is recommended since the question of general applicability of the regulation may cause significant inaccuracies in Medicaid reimbursement.

Article IX, sec. 15, Constitution of the State of Alaska

THE LEGISLATURE'S AUTHORITY TO DELEGATE THE POWER TO DESIGNATE PERMANENT FUND INVESTMENTS.

The opinion examined Article IX, sec. 15's language that requires the permanent fund's principal "be used only for those income-producing investments specifically designated by law." The opinion concluded that this language would permit the legislature to delegate by statute the authority to designate the investments of fund principal to the board of trustees of the permanent fund. The opinion cautioned that the statutory delegation had to provide standards adequate to guide and limit the board's exercise of delegated discretion. The opinion found that the adoption of the prudent investor rule, standing alone, would constitute an adequate standard for the delegation of investment designation authority. Currently, Chapter 46, SLA 2005, delegates investment designation authority to the

board of trustees of the permanent fund under a Prudent Investor Rule standard.

2005 Informal Op. Att'y Gen. (February 15, 2005; File No. 663-05-0141).

The opinion does not address any effect that Article XII, sec. 11 might have on the opinion's conclusion that the legislature may delegate authority to "specifically designate[]" investments for the fund's principal. Article XII, sec. 11 provides that in Alaska's constitution, "the terms 'by law' and 'by the legislature,' ... are used interchangeably when related to law-making powers." The interplay between Art. XII, sec. 11 and Art. IX, sec. 15 raises an issue whether the opinion is correct in its conclusion that authority to designate investments for the fund principal is in fact delegable.

Legislative review is recommended to review whether Art. IX, sec. 15 and Art. XII, sec. 11, considered together, allow the legislature to delegate investment designation authority and, if so, whether the prudent investor rule comprises an adequate standard for such a delegation.

Art. XI, secs. 4 and 6, Constitution of the State of Alaska

LEGISLATURE LIMITED IN ITS POWER TO VOID AN INITIATIVE.

Interpreting the Alaska Constitution, art. XI, secs. 4 and 6, the Alaska Supreme Court held for the first time that the power to void an initiative by enacting legislation should not be equated with the power to amend an initiative enacted by the voters. The court explained that the Alaska Constitution contains no explicit limitation on the legislature's power to amend an initiative enacted by the voters but it does contain such a limitation on the legislature's power to void a proposed initiative, requiring legislation to be "substantially the same" as the initiative. In this case, the lieutenant governor was directed to place an initiative restricting the governor's power to temporarily appoint a United States senator on the ballot since the court found that legislation intended to void the initiative was not substantially the same as the initiative.

State of Alaska, et. al. v. Trust the People, 113 P.3d 613 (Alaska 2005)

Legislative review is not recommended since the case involves constitutional interpretation, an issue reserved for the court.

Alaska R.Civ. P. 15(c)

IDENTITY OF INTEREST STANDARD FOR AMENDMENTS TO PLEADINGS IN SUITS AGAINST PRIVATE PARTIES.

Traci Phillips was involved in an auto accident with Carl Gieringer who was insured under a policy with his father. After some negotiations with the insurer, Phillips filed suit but mistakenly listed the father as the driver. After the statute of limitations had run, Phillips discovered her mistake and moved to amend her complaint under Alaska Rule of Civil Procedure 15. That Rule allows for the amendment of pleadings and provides that those amendments relate back to the filing date of the original pleadings in certain circumstances. If the amendment involves the addition of a party, Rule 15(c) requires that the party have fair notice of the cause of action within the applicable limitations period. One way to establish this notice is through the identity of interest of the parties. "[T]he identity of interest standard . . . requires a nexus between the old and new parties as to the subject of the litigation and an analogous legal position within the case itself." The Alaska Supreme Court found that there will often be an identity of interest between an insurance company and its insured, but not always. Therefore, the court held that in Alaska there is a presumption that notice of a lawsuit may be imputed from an insurer to an insured but that this presumption may be overcome if the insured can show that the insured's interests conflict or are different than those of the insurer. The court found that Carl had an identity of interest with his insurer.

Phillips v. Gieringer, 108 P.3d 889 (Alaska 2005)

Legislative review is not recommended.

Alaska R.Civ. P. 82(a)

CATALYST THEORY FOR DETERMINING PREVAILING PARTY STATUS: ATTORNEY'S FEES NOT AVAILABLE IF LEGISLATIVE INTENT UNCLEAR.

The Alaska Supreme Court has previously described the "catalyst theory" for determining prevailing party status as one that requires a party to show that a "goal of the litigation" initiated by the party was achieved by succeeding on "any significant issue which achieves some of the benefit sought in bringing the suit." The party must then show that its lawsuit was "a substantial factor or significant catalyst" in the action

that caused the case to become moot.

A voter who challenged the constitutionality of election procedures relating to voting on an initiative asked for attorney's fees on the basis of what he construed as corrective legislation that caused his lawsuit to be moot. The court denied the fees by rejecting the "catalyst theory" for establishing prevailing party status when the legislature's motives for changing election procedures are unclear.

Halloran v. State, Division of Elections, 115 P.3d 547 (Alaska 2005)

Legislative review is not recommended.

Alaska R.Civ. P. 82

ATTORNEY FEE AWARD DISALLOWED FOR CLASS ACTION CERTIFICATION.

The trial court awarded a percentage of attorney's fees and costs associated with certification of a class action to be paid by a named plaintiff who lost a challenge to Alaska Airlines' decision to modify the frequent flyer program. Addressing the fee issue for the first time, the Supreme Court drew a distinction between limiting attorney's fees for which a class representative may be liable in litigating the merits of a claim and exposing named plaintiffs to the additional risk of having to pay substantial fees litigating class certification and notice issues on behalf of absent class members. The court remanded the case for further findings related to limiting the award of attorney's fees to those incurred by litigating substantive matters.

Monzingo v. Alaska Air Group, 112 P.3d 655 (Alaska 2005)

Legislative review is not recommended.

Alaska R.Civ. P. 90.3

PROCEEDS FROM SALE OF STOCK ARE NOT AUTOMATICALLY INCLUDED IN CHILD SUPPORT CALCULATION.

Court disallowed child support calculation based upon the value of the proceeds of a sale of stock divided over a five year period that was specified in the sale agreement not to compete and the obligor's subsequent voluntary unemployment. The case was remanded for further consideration of facts to

determine whether the obligor made a "voluntary and unreasonable" choice to forego a regular income.

Caldwell v. State of Alaska, et. al., 105 P.3d 570 (Alaska 2005)

Legislative review is not recommended due to the fact specific nature of the decision and the relatively low incidence of these facts in child support cases.

Alaska R.Civ.P.90.3(h)

MODIFICATION OF CHILD SUPPORT ARREARS.

An obligor parent petitioned to reduce the amount of child support arrears on the basis that his children did not live with the mother who received the child support. The court denied the petition to modify because the rule only allowed modification of arrearages when the children lived with the obligor. In this case, the children lived with the maternal grandmother, not the obligor father. The court reasoned that the grandmother could seek reimbursement from the payments made to the mother but the obligation to pay should not be reduced.

Webb v. Alaska Department of Revenue, 120 P.3d 197 (Alaska 2005)

Legislative review is not recommended.

Alaska Evidence Rule 803(2)

CRIME VICTIM'S STATEMENT TO POLICE OFFICER NOT TESTIMONIAL.

In Anderson v. State, Alaska App. Memorandum Opinion and Judgment No. 4823 (Alaska App. January 28, 2004), the Alaska Court of Appeals held that, when a police officer asks a crime victim "What happened?", the statement of the crime victim is admissible through the testimony of the police officer under the excited utterance exception to the hearsay rule. Alaska Evidence Rule 803(2). In this case, Anderson contends that the admission of that excited utterance violates the Confrontation Clause of the United States Constitution. The Alaska Court of Appeals concludes in this case that there is no Confrontation Clause violation as the excited utterance of a crime victim under these circumstances is not testimony under the Confrontation Clause.

Anderson v. State, 111 P.3d 350 (Alaska App. 2005)

Legislative review is not recommended.

AS 04.16.050

REQUIREMENT OF PROBATION FOR PERSONS UNDER THE AGE OF 21 DOES NOT VIOLATE EQUAL PROTECTION BECAUSE IT REQUIRES YOUNGER OFFENDERS TO BE ON PROBATION LONGER THAN OLDER OFFENDERS.

AS 04.16.050 makes it illegal for persons under the age of 21 to possess, control, or consume alcoholic beverages. A person that is convicted of violating this provision at least three times must be placed on probation for one year or until the person attains the age of 21, whichever is longer. Morgan and others asserted that this mandatory probation violated the equal protection provision of the Alaska Constitution as it required youthful offenders to stay on probation longer than older offenders. The Alaska Court of Appeals found that the legislature enacted the mandatory probation provision to deter underage persons from drinking. It also found that, as to those who could not be deterred, the legislature wanted the recidivist underage persons to be kept under state and court supervision until they were legally able to consume alcohol. The court found that it was not unreasonable for the legislature to conclude that more youthful offenders should require longer supervision and monitoring than older offenders and that there may not be any point in monitoring someone beyond the age at which the person can legally consume alcohol.

State v. Morgan, 111 P.3d 360 (Alaska App. 2005)

Legislative review is not recommended.

AS 09.20.090

BATSON CLAIMS MUST BE MADE BEFORE REMAINING MEMBERS OF JURY POOL ARE RELEASED AND JURY IS SWORN.

Under the United States Supreme Court decision in Batson v. Kentucky, 476 U.S. 79 (1986), a prosecutor may not exercise peremptory challenges of members of a jury pool based upon racial bias. The United States Supreme Court did not say when a Batson claim must be raised by a defendant to be timely but left that issue up to state courts. The Court further

stated that state courts may adopt general rules that Batson claims are untimely if raised for the first time on appeal or after the jury is sworn. In this case, the Alaska Court of Appeals held that a Batson claim is untimely if raised after the remaining members of the jury pool are released and the jury is sworn.

Mooney v. State, 105 P.3d 149 (Alaska App. 2005)

Legislative review is not recommended.

AS 10.06.463

CORPORATE DIRECTOR MAY BE BARRED FROM REELECTION FOR MISCONDUCT.

A corporate director of an Alaska Native Corporation was found by a jury to have breached his fiduciary duties after the expiration of his three year term as director. The superior court permanently barred the director from seeking reelection to the board of directors under a statutory provision allowing the court to remove a director. The Supreme Court held that the provision applies to reelection of a board member whose term had expired.

Martinez v. Cape Fox Corporation, 113 P.3d 1226 (Alaska 2005)

Legislative review is recommended to clarify the extent of the court's authority in relation to expired terms.

AS 11.41.220
Alaska R.Cr.P. Rule 6(p), (q)

PROSECUTOR NOT REQUIRED TO NOTIFY GRAND JURY THAT DEFENDANT WISHES TO TESTIFY IF TESTIMONY DOES NOT TEND TO NEGATE THE DEFENDANT'S GUILT.

Cameron had apparently not been making the payments on his Chevy Suburban. Whilst the "repo-man and woman" were preparing to take his vehicle away Cameron exited his house with an assault rifle and pointed it at the "repo-ers" and ordered them to leave. The police were notified and Cameron was arrested and charged with assault in the third degree, a felony. Cameron notified the prosecutor that he wished to appear before the grand jury and present his version of the events in question. Cameron apparently believed that he misunderstood what the "repo-man and woman" were doing and was prepared to testify that he believed them to be thieves.

The Alaska Court of Appeals found that Cameron's proposed testimony did not dispute the essential facts of the encounter and merely went to his state of mind and was not clearly exculpatory evidence presentation of which is required by Alaska Criminal Rule 6(q). Cameron also argued that the federal courts and a number of states have adopted statutes or court rules allowing potential defendants to testify before the grand jury and Alaska should also. The court of appeals noted that these new laws or rules are in derogation of the common law, that Cameron's proposal would alter the common law, and that the duty of the courts is "to preserve the pre-existing common law unless the legislature--or in this case, the supreme court--has clearly indicated its purpose to change that law."

State v. Cameron, 113 P.3d 687 (Alaska App. 2005)

Legislative review is recommended if the legislature decides that a potential criminal defendant should be entitled to testify before the grand jury. The legislature may amend court rules of procedure with a two-thirds majority vote.

AS 11.41.220-(a)(1)(C)(i)

ASSAULT OF CHILD REASONABLY REQUIRING MEDICAL TREATMENT.

AS 11.41.220(a)(1)(C)(i) provides that an adult commits assault in the third degree if the adult recklessly causes physical injury to a child under 10 years of age and the injury reasonably requires medical treatment. Wells was convicted of this offense. On appeal, Wells asserted that the injuries sustained by the child in his care were caused by the child's fall from a crib, that any medical care the child received was for medical diagnosis, and that the child recovered naturally from the bruises the child received. The Alaska Court of Appeals reversed Wells' conviction, finding that the term "medical treatment" did not necessarily include diagnosis. The court looked to previous decisions and other statutory references to conclude that "medical treatment" was a narrower term than "medical attention" or "medical diagnosis or treatment."

Wells v. State, 102 P.3d 972 (Alaska App. 2004)

Legislative review is recommended as it appears that the legislature intended a broader definition than was applied by the court in this case.

AS 11.41.270
AS 11.41.260

FOR STALKING COMMITTED BY VIOLATING A PROTECTIVE ORDER ALL CONSTITUENT ACTS OF NON-CONSENSUAL CONTACT MUST VIOLATE A PROTECTIVE ORDER.

One form of first degree stalking provides that the actions constituting the offense violated a protective order. The actions constituting the offense are a course of conduct engaged in by the defendant that recklessly place another person in fear of death or physical injury to the person or to a family member. A course of conduct is basically repeated acts of nonconsensual contact. The Alaska Court of Appeals held that each of the constituent acts of nonconsensual contact used to show the course of conduct must violate a protective order.

Kenison v. State, 107 P.3d 308 (Alaska App. 2005)

Legislative review is not recommended.

AS 11.41.510(a)(1)

ROBBERY CONVICTION PROPER WHEN A PERSON IS OBSERVED SHOPLIFTING BY CAMERA AND THEN INJURES A STORE EMPLOYEE WHILE FLEEING.

Robbery in the second degree requires the taking of property from the "immediate presence and control" of another person and using or threatening the use of force to overcome resistance to the taking of the property or the retention of the property after taking. Security personnel watching security cameras at the J.C. Penney store in Anchorage observed Ward conceal merchandise. Ward left the main part of the store and crossed the skybridge to the parking garage where he was confronted by another security officer. Ward refused to accompany the security officer back to the store and pushed the officer, the officer held on to Ward and after Ward pushed the officer again they both fell down the stairs and the security officer suffered various injuries. Ward was convicted of robbery in the second degree among other charges. On appeal Ward argued that taking property while security personnel watch security cameras cannot amount to taking property from the immediate presence and control of another person and that any force used by Ward was after he left the store. The Alaska Court of Appeals rejected Ward's arguments, finding that the legislature had made a policy decision that property does not have to be in physical contact with the victim for robbery to occur and that the force used by Ward was exercised to

overcome resistance to his retention of the property.

Ward v. State, 120 P.3d 204 (Alaska App. 2005)

Legislative review is not recommended.

AS 11.46.300
Alaska R.Cr. P. Rule 7 and 12

FAILURE TO IDENTIFY THE INTENDED OFFENSE IN A BURGLARY INDICTMENT IS A DEFECT OF FORM THAT MUST BE RAISED BEFORE TRIAL.

Semancik was indicted and later convicted of attempted burglary in the first degree. Semancik's indictment did not disclose what crime Semancik intended to commit as the object of that burglary. Semancik raised this issue for the first time on appeal to the Alaska Court of Appeals and that court reversed the conviction. Semancik v. State, 57 P.3d 682 (Alaska App. 2002). The court of appeals found that Semancik's indictment was fatally flawed based upon Adkins v. State, 389 P.2d 915 (Alaska 1964). The state petitioned the Alaska Supreme Court for review and the Court reversed the court of appeals, overruled Adkins, and reinstated the conviction. The Court found that, while the state is required to specify the defendant's intended crime in a burglary indictment, the specific intended offense is not an element of the crime of burglary in Alaska. As it is not an element of the crime of burglary, challenges to the indictment may not be raised for the first time on appeal (as Semancik did) but must be raised prior to trial (as required by Criminal Rule 12) or the defect in the indictment (in this case the failure to specify the intended crime) will be waived (Criminal Rule 7).

State v. Semancik, 99 P.3d 538 (Alaska 2004)

Legislative review is not recommended.

AS 11.56.590(a)

JURY TAMPERING STATUTE DOES NOT VIOLATE FIRST AMENDMENT.

The U.S. Court of Appeals for the Ninth Circuit reviewed a habeas corpus petition arising out of the refusals by Alaska courts to dismiss state jury tampering charges against the petitioner filed under AS 11.56.590(a). The petitioner argued that AS 11.56.590(a) was an overbroad restriction of speech in violation of the First Amendment as interpreted by the U.S. Supreme Court. In state proceedings, the Alaska Supreme

Court had held otherwise and had affirmed a superior court's refusal to dismiss the charges in Turney v. State, 936 P.2d 533 (Alaska 1997).

Under the federal standard, the petitioner would have been entitled to habeas relief only if the Alaska Supreme Court's First Amendment holding represented an "objectively unreasonable" application of U.S. Supreme Court precedent. In Turney, the Alaska Supreme Court had interpreted AS 11.56.590(a) to prohibit only speech intended to affect how a jury decides a specific case where the speaker has intent to influence the outcome and knows that he or she is communicating with a juror.

The Ninth Circuit reviewed First Amendment precedent and agreed with the Alaska Supreme Court's holding in Turney that such communications were not protected. Thus, it found that the Alaska Supreme Court's holding was not "objectively unreasonable." Accordingly, the Ninth Circuit upheld a federal district court's denial of habeas relief to the petitioner.

Turney v. Pugh, 400 F.3d 1197 (9th Cir. 2005).

Legislative review is not recommended.

AS 11.56.745

AGREEMENT NOT TO DISCLOSE CHILD ABUSE IS CONTRARY TO PUBLIC POLICY.

The mother of a child who was the subject of substantiated allegations of sexual abuse by the father agreed in open court not to disclose the abuse in future court proceedings in exchange for primary custody of the child. The mother subsequently applied for a protective order on behalf of the child and described the past allegations of abuse in the application. A trial court found the mother in contempt of court for violating the prior agreement. The Supreme Court overturned, refusing to uphold the agreement on public policy grounds, including the criminal prohibition of interfering with a report of domestic violence.

Lana C. v. Cameron P., 108 P.3d 896 (Alaska 2005)

Legislative review is not recommended except to the extent that the legislature intends to expand or to modify the policy against prohibiting disclosure of domestic violence or child abuse.

AS 11.61.123

WHEN PROOF OF CULPABLE MENTAL STATE WITH REGARD TO AGE OF VICTIM IS NECESSARY IN INDECENT VIEWING OR PHOTOGRAPHY PROSECUTION.

Indecent viewing or photography makes it a crime to view or take a picture of a person under certain circumstances without consent. If the victim is 16 years of age or older, only the victim's consent is required; if the victim is 13 - 15 years of age, the consent of the victim and the victim's parents is required; if the victim is less than 13 years of age, the consent of the victim's parents is required. Knutsen was a lifeguard at a swimming pool. One night he installed a video camera in the women's locker room at the pool. Knutsen recorded two women and six girls in various states of undress. Knutsen was convicted of two counts of producing indecent photographs of adults without their consent (a misdemeanor) and six counts of producing indecent photographs of minors under the age of 13 without the consent of their parents (a felony). To avoid indecent viewing of photography requires the consent of the victim. On appeal, Knutsen argued that he could not be convicted of the felony charges as the state was required to and had failed to prove he knew he would be photographing minors in the locker room. The Alaska Court of Appeals rejected this contention, finding that proof of a culpable mental state regarding the age of the victim will only be necessary in circumstances where proof of consent of an additional person is required by the statute and the state argues that the defendant did not obtain that additional consent. Since Knutsen's conduct was surreptitious (that is, he did not attempt to obtain the consent of his victims) the age of victims is only relevant to determine the penalty for Knutsen's offenses.

Knutsen v. Alaska, 101 P.3d 1065 (Alaska App. 2004)

Legislative review is not recommended.

AS 12.55.015(e)(2)
AS 33.30.061
AS 33.30.065

TRIAL COURT HAS NO AUTHORITY TO REQUIRE THE DEPARTMENT OF CORRECTIONS TO ALLOW A PRISONER TO SERVE HIS SENTENCE UNDER HOUSE ARREST WITH ELECTRONIC MONITORING.

Degrate was convicted of second and third degree assault from a shooting incident and was sentenced to seven years of imprisonment with five years suspended. Approximately three months after his sentencing, Degrate sought to modify his

sentence by asking the sentencing court to order the Department of Corrections to let him serve his sentence by house arrest with electronic monitoring. The trial court found that it did not have the authority to order the Department of Corrections to do this and on appeal the Alaska Court of Appeals affirmed. The court stated that AS 12.55.015(e)(2) only allows a court to recommend that a prisoner serve a sentence by electronic monitoring, and that AS 33.30.061 and 33.30.065 give the commissioner of corrections the discretion to allow a prisoner to serve a sentence by electronic monitoring.

Degrate v. State, 117 P.3d 769 (Alaska App. 2005)

Legislative review is not recommended.

AS 12.55.125(k)(2)

SENTENCING OF CERTAIN FIRST FELONY OFFENDERS NOT SUBJECT TO PRESUMPTIVE SENTENCING.

The Alaska Court of Appeals, in Austin v. State, 627 P.2d 657 (Alaska App. 1981), found that, absent special circumstances, a first felony offender should not receive a harsher sentence than a second felony offender but rather should receive a more favorable sentence than a second offender. The legislature codified this concept in AS 12.55.125(k)(2), which differed slightly from Austin in that it states that a first felony offender should not receive a sentence that exceeds the sentence for a second felony offender. Under Austin, a first felony offender should receive a sentence less than a second felony offender ("more favorable sentence"), but under the statute a first felony offender should receive a sentence less than or equal to a second felony offender ("sentence does not exceed"). In this case the Alaska Court of Appeals found that the statute controls and supplants Austin.

Dayton v. State, 120 P.3d 1073 (Alaska App. 2005)

Legislative review is not recommended.

AS 12.55.155

STANDARD OF REVIEW OF A SUPERIOR COURT'S DECISION REGARDING THE PRESENCE OR ABSENCE OF AGGRAVATING OR MITIGATING FACTORS.

The Alaska Supreme Court stated:

> We have never determined the standard of review of a superior court's decision regarding the presence or absence of aggravating or mitigating factors. The parties appear to have assumed that the court of appeal's decisions applying the clearly erroneous standard of review resolved the question. We conclude that the court of appeals erred in reviewing the superior court's rejection of Michael's proposed mitigating factors under a clearly erroneous standard. We hold that the correct standard of review of a superior court's application of statutory aggravating and mitigating factors to a given set of facts is de novo review.

Michael v. State, 115 P.3d 517 (Alaska 2005)

Legislative review is not recommended.

AS 12.72.020

POST-CONVICTION DNA TESTING.

Osborne was convicted of kidnapping, first degree sexual assault, first degree assault, and third degree assault for acts committed in 1993. Osborne's codefendant was convicted of similar charges. Osborne appealed his conviction and the conviction was affirmed in 1996. The present appeal is from the denial of Osborne's petition for post-conviction relief based upon the claim that he was provided with the ineffective assistance of counsel as Osborne alleged that his counsel should have performed more discriminating DNA tests of the physical evidence in the case. Osborne asked that those tests be conducted as part of his post-conviction relief proceeding and further argued that due process required that those tests be conducted at state expense. Osborne's counsel provided an affidavit that the decision to not request the more discriminating DNA testing was a tactical one based upon the codefendant's confession that Osborne was his accomplice, the planned defense of mistaken identity, and a desire to not provide the prosecution with evidence that might further

implicate Osborne. The court found that Osborne had not sustained his burden of showing that his counsel was incompetent, and that due process did not require post-conviction DNA under the facts and circumstances presented by Osborne. Osborne appealed and the Alaska Court of Appeals found that Osborne had not established that he was provided with the ineffective assistance of counsel. The court then considered his claim that he had a due process right to have additional DNA testing performed and found that the U.S. Constitution does not provide that right. The court found that several state courts under their state constitutions have found that defendants have a due process right to obtain post-conviction DNA testing of physical evidence and to offer the results of that testing to establish their factual innocence. But the court found that a defendant is not entitled to this testing under these decisions unless the defendant shows "(1) that the conviction rested primarily on eyewitness identification evidence, (2) that there was a demonstrable doubt concerning the defendant's identification as the perpetrator, and (3) that scientific testing would likely be conclusive on this issue." The court then remanded the case to the trial court to determine if Osborne could meet these three requirements and, if the trial court does find that Osborne can satisfy this test and directed the trial court to consider whether Osborne's claim is barred under the post-conviction relief statute or if the due process clause of the Alaska Constitution requires that Osborne be allowed to pursue his claim.

Osborne v. State, 110 P.3d 986 (Alaska App. 2005)

Legislative review is recommended if the legislature desires to implement a statutory right or procedure for post-conviction DNA testing.

AS 13.12.207(a)

WRONGFUL DEATH PROCEEDS NOT INCLUDED IN SURVIVING SPOUSE'S PROPERTY.

The decedent executed a will leaving an elective share and other statutory benefits to his wife, with the remainder of his estate left in trust to his two minor children who were not his wife's children. The question before the court was whether the wife's agreed percentage of the wrongful death proceeds should be included in the decedent's augmented estate for purposes of determining her elective share. Since the legislative history was silent with respect to wrongful death benefits, the court looked to the policy implications and held

that wrongful death proceeds are not property owned by the surviving spouse at the time of the decedent's death and therefore, should not be included within the augmented estate under the elective share statutes. Only the portion of the settlement that is attributable to survivorship claims should be included in the augmented estate.

In re Estate of Maldonado v. Bailey, 117 P.3d 720 (Alaska 2005)

Legislative review is recommended in order to determine whether the judicially articulated policy is consistent with legislative intent.

AS 13.16.435

BURDEN OF PROOF FOR PURPOSES OF AWARDING "REASONABLE AND NECESSARY" EXPENSES AND ATTORNEY FEES CHARGED TO AN ESTATE.

A law firm was hired by the personal representative to an estate. The son of the deceased, a beneficiary to the estate, challenged the amount of expenses and fees charged to the estate by the law firm. The Supreme Court found that personal representatives and attorneys are in the best position to demonstrate the reasonableness of fees and, siding with other jurisdictions, concluded that the burden of proving the reasonableness of attorney's fees in estate actions falls on the attorney whose fees are being challenged. The Court also required that the billing records submitted in probate matters include a level of specificity that allows a correlation between the matter involved and the entry in the record to be made.

Johnson v. Hughes Thorsness Powell Huddleston & Bauman LLC (In re Estate of Johnson), 119 P.3d 435 (Alaska 2005) (rehearing denied)

Legislative review is not recommended.

AS 14.03.090
AS 14.07.050
AS 14.07.070
AS 14.08.111(9)
AS 14.14.090(7)

CORRESPONDENCE SCHOOL PARENTS MAY NOT PURCHASE AND USE RELIGIOUS MATERIAL IN PLACE OF APPROVED TEXTBOOKS AND MATERIALS; PUBLIC SCHOOL DISTRICTS AND TEACHERS MAY NOT ADVOCATE RELIGION BUT PARENTS WHO PROVIDE A HOME SCHOOL EDUCATIONAL PROGRAM MAY.

The Attorney General's office issued an informal opinion interpreting statutes relating to the funding of correspondence school programs and religious advocacy. The opinion found that, although AS 14.07.050 recognizes a parent's right to use privately purchased religious materials "not provided by the school district" to supplement correspondence education, under AS 14.07.050, AS 14.08.111(9), and AS 14.14.090(7) religious materials may not be used to replace district-approved textbooks and materials. The opinion further explains that AS 14.03.090 restricts the advocacy of religion by school districts and public school teachers, but not by parents who provide a home school educational program. Although correspondence schools are within the definition of "public school" in AS 14.60.010(6) and a public school teacher is subject to AS 14.03.090, a parent's interest in providing a religious education to the parent's child is protected under the free exercise clauses of the Alaska and United States constitutions.

2005 Informal Op. Att'y Gen. (September 20, 2005; File No. 663-05-0233)

Legislative review is not recommended.

AS 14.17.510(c)

LOCAL CONTRIBUTIONS OF SCHOOL DISTRICTS.

The opinion examined AS 14.17.510(c), which provides that if there is an increase in the assessed value of property in a city or borough school district, only fifty percent of the annual increase is used to determine the amount of the required local contribution for education. The opinion concluded that the fifty percent cap on assessment increases in local contribution determinations applied to increases that resulted from annexation of new territory. The opinion found that although the legislature did not specifically consider the effect of annexations when enacting this provision, the legislature did evince a general intent to provide relief to local taxpayers. Because annexation-caused assessment increases would adversely affect taxpayers the same way other sorts of assessment increases would, the opinion reasoned that the fifty percent cap should apply.

The opinion also concluded that for districts formed after 1999, which is the base year for local contribution determinations under AS 14.17.510(c), a new base year would have to be set by a policy-making body for purposes of

applying the fifty percent cap. The opinion identified the legislature or the Department of Education and Early Development as policy-making bodies appropriate to set a base year.

2005 Informal Op. Att'y Gen. (April 25, 2005)

Legislative review is recommended to determine whether a base year should be established for districts formed after 1999 and, if so, to determine which body should establish the base year.

AS 14.25.060

TEACHERS' RETIREMENT SYSTEM ARREARAGE INDEBTEDNESS ANNUAL RATE CALCULATION INVOLVING CERTAIN CREDITABLE OUTSIDE SERVICE.

Two teachers taught in a Bureau of Indian Affairs (BIA) school prior to a change in the statute that lowered the percentage allowed for credited outside service under the teachers' retirement system arrearage indebtedness calculation. After the statutory change, the teachers vested in the system by working in state schools. They challenged the Department of Administration's decision to split credited service by applying a lower multiplier to their outside creditable service and argued that they were entitled to the higher multiplier for the earlier outside service and for the state service since they "joined the system" before the change. The Supreme Court held that the department was prohibited from splitting the arrearage calculation in computing the teachers' credited service and found that the higher multiplier applied to claims based on creditable outside service that involve a combination of military or BIA service.

Bartley v. State, Department of Administration, Teachers' Retirement Board, 110 P.3d 1254 (Alaska 2005)

The Supreme Court acknowledged the statute's ambiguity. However, in reaching its conclusion, the court considered both the language of the section and its legislative history. The court concluded that the latter was consistent with the former. Unless the legislature disagrees with the court's conclusion, legislative review is not recommended.

AS 15.30.070

ALASKA CAMPAIGN DISCLOSURE ACT INHERENTLY AUTHORIZES THE REGULATION OF SOFT MONEY CONTRIBUTIONS.

The Alaska Public Offices Commission adopted a regulation requiring the disclosure by political parties of soft money contributions and expenditures. The Alaska Campaign Disclosure Act expressly regulates only hard money. The Supreme Court upheld the regulation, as being authorized by the Act, since the regulation of soft money contributions and expenditures facilitate the enforcement of hard money limits.

Libertarian Party of Alaska, et. al. v. Alaska Public Offices Commission, 101 P.3d 616 (Alaska 2004)

Legislative review is recommended to clarify the extent of authority of the Alaska Public Offices Commission to regulate soft money campaign contributions and expenditures.

AS 16.05.251
AS 16.43.010 et seq

BOARD OF FISHERIES REGULATION CREATING A COOPERATIVE FISHERY AND ALLOCATING A QUOTA OF SALMON TO THAT FISHERY CONFLICTS WITH THE LIMITED ENTRY ACT.

The Board of Fisheries created a Chignik cooperative fishery by regulation. Seventy-seven permit holders in the Chignik fishery elected to form a co-op as authorized by the board and 18 boats fished on behalf of the co-op. The quota allocated to the co-op was determined by the number of fishers joining the co-op. Grunert, a high-earning Chignik fisher, did not participate in the co-op and filed suit challenging the regulation. The superior court determined that the regulation was valid; the Alaska Supreme Court reversed. First, the Court found that AS 16.05.251(e) allows the Board to allocate "fishery resources among personal use, sport, guided sport, and commercial fisheries." The Court found that this grant of authority by the legislature does not allow the Board to allocate "within" a fishery. Further, the regulation conflicts with the historical allocation of fisheries in Alaska and the spirit of the Limited Entry Act. The Court concluded that "the legislature must first authorize the board to approve cooperative salmon fisheries."

Grunert v. State and Chignik Seiners Association, Inc., 109 P.3d 924 (Alaska 2005)

Legislative review is recommended if the legislature wants the Board of Fisheries or the Commercial Fisheries Entry Commission to be able to create cooperative fisheries.

AS 16.43.010
AS 16.43.240

LIMITED ENTRY PERMITS AND NON-DISTRESSED FISHERIES.

The Limited Entry Act allows the Commercial Fisheries Entry Commission to limit participation in a fishery. The commission limited entry in the Northern Southeast Inside sablefish longline fishery. Simpson applied for a permit and received points based upon his previous participation in the fishery. The points received by Simpson were probably not going to be enough to allow him to receive a permit and Simpson argued that the commission was setting the maximum number of permits too low in the fishery which was non-distressed. The Alaska Supreme Court found that the Limited Entry Act does not provide guidelines for setting the maximum number of permits for non-distressed fisheries other than that the number should serve the purpose of the Act. The Supreme Court held that the commission must set the maximum number at a level not less "than the highest number of units of gear fished in any one of the four years prior to the limitation of the particular fishery."

Simpson v. State, 101 P.3d 605 (Alaska 2004)

Legislative review is only recommended if the Legislature desires to set more specific guidelines for non-distressed fisheries or disagrees with the formula used by the court.

AS 16.43.210
AS 16.10.267(a)
AS 16.05.675

FEDERALLY PERMITTED FISHERS CAN BE REQUIRED TO OBTAIN ALASKA PERMITS IN ORDER TO LAND THEIR CATCHES IN ALASKA.

Dupier and others, who did not fish in Alaska waters, were cited for landing their fish in Alaska without a state permit. The trial court dismissed the charges and the Alaska Court of Appeals affirmed, finding that the state had no authority to require fishers in federal waters to obtain certain state permits to land their catches in Alaska. The Alaska Supreme Court reversed, finding that AS 16.43.140 authorized the Commercial Fisheries Entry Commission (CFEC) to require all fishers in Alaska to have entry permits or interim-use permits; that AS 16.10.267(a) authorized CFEC to require

fishers landing fish in Alaska taken from other waters to have interim-use permits; and that Dupier and the others were properly charged under AS 16.05.675 because they did not have an interim-use permit. The Court further rejected federal supremacy arguments and various constitutional arguments.

State v. Dupier, 118 P.3d 1039 (Alaska 2005)

Legislative review is not recommended.

AS 18.66.100(b)
AS 18.66.990(3)

BASIS FOR DOMESTIC VIOLENCE PROTECTIVE ORDERS.

Kirn was granted a domestic violence protective order against her ex-husband McComas. The superior court found that McComas had committed two crimes of domestic violence against Kirn, breaking out the windows of a car belonging to Kirn's mother amounting to criminal mischief and making threats of harm against Kirn amounting to stalking. The Alaska Supreme Court found that the superior court's reliance on the criminal mischief directed against Kirn's mother as a basis for the protective order was "problematic" as a crime of domestic violence must be committed against the petitioner under AS 18.66.100(b). The Supreme Court did find that threats made by McComas directed to Kirn, the petitioner, did amount to stalking in the second degree and could serve as a basis for the protective order.

McComas v. Kirn, 105 P.3d 1130 (Alaska 2005)

Legislative review is not recommended.

AS 21.89.020(c), (e)

WHAT IS AN "OFFER" OF INSURANCE COVERAGE?

In two cases involving the interpretation of a statute requiring insurance companies to offer uninsured motorist's coverage, the Supreme Court held that the statutorily required offer must include notification by the insurance companies of the coverage availability and a description of the coverage either in writing or verbally. The court stopped short of requiring the notice to include the premium cost for each option as long as that information was available upon request. The court relied upon the language of the statute, the legislative history, and the problem addressed by the statute in construing the meaning of "offer" in the context of UIM coverage.

GEICO v. Graham-Gonzales and State Farm v. Bozinoff, 107 P.3d 279 (Alaska 2005)

Legislative review is recommended to determine whether the court correctly interpreted the meaning of the term "offer."

AS 22.10.020(g)

DECLARATORY JUDGMENT ACTION FOR DEFAMATION REQUIRES SHOWING OF ACTUAL MALICE.

A former assemblyman petitioned the assembly to consolidate the Fairbanks-North Star Borough and the City of Fairbanks, and made representations related to meetings with the municipal staff. The city mayor publicly called into question the truth of the representations and was sued for defamation in a declaratory action seeking an apology. The court held that the "actual malice" standard for defamation actions seeking monetary relief applied to declaratory relief cases.

Lowell v. Hayes, 117 P.3d 745 (Alaska 2005)

Legislative review is not recommended.

AS 23.10.060(d)(12)

EXEMPTION FROM OVERTIME PAY UNDER THE ALASKA WAGE AND HOUR ACT.

A home health care nursing supervisor appealed an exemption of her overtime hours from the Alaska Wage and Hour Act. The Act exempts "an employee of a hospital whose employment includes the provision of medical services." The court reviewed the legislative intent supporting an amendment to the exemption and concluded that the exemption was intended to address an interest in enhancing access to health care by providing more flexible schedules for hospital employees. In this case, the employee spent many of her overtime hours at home reviewing payroll records. The court interpreted the exemption as not placing limits on the extent that the employee's job involved the provision of medical services but including, to any extent, that function. An opinion letter submitted from the Department of Labor stated that the exemption applied only to those who "directly provide medical services." The court held that, since the nurse testified that she directly provided medical services as a regular part of her duties, her work not involving direct patient care was also

exempt from the Wage and Hour Act.

Hutka v. Sisters of Providence, 102 P.3d 947 (Alaska 2004)

Since this case involves statutory interpretation turning on legislative intent, more than one interpretation may be reasonable. Legislative review is recommended.

AS 23.30.130(a)

LAST INJURIOUS EXPOSURE AND MODIFICATION OF WORKERS' COMPENSATION AWARD.

An employer who sought an offset of a workers' compensation award on the basis of alleged mistakes of law made by the workers' compensation board related to previous employment was not entitled to a modification of the award. Instead, the employer was limited to appealing the board's decision or seeking reconsideration within the statutory time limits.

Easley v. Lindekugel, 117 P. 3d 734 (Alaska 2005)

Legislative review is not recommended since the decision is consistent with the concepts of finality.

AS 25.20.060
AS 25.24.150(c)

NONPARTY MAY BE AWARDED CUSTODY OF A CHILD UNDER CERTAIN CIRCUMSTANCES.

The maternal grandmother was awarded temporary physical custody of two children after having been dismissed from the lawsuit before the custody was ordered. The father appealed, arguing in part that the maternal grandmother was not a party to the custody dispute and therefore could not be subject to the order. The Supreme Court disagreed and described circumstances under which a court could award custody to a nonparty, including: (1) consent of the nonparty; (2) the existence of clear and convincing evidence to overcome the parental preference for custody; (3) the opportunity of the nonparty to have intervened; and (4) sufficient notice to the parties of the possibility that a nonparty will receive custody in order to satisfy due process.

Elton H. v. Naomi R., 119 P.3d 969 (Alaska 2005)

Legislative review is recommended to either confirm nonparty awards in child custody matters or to prohibit them.

AS 25.20.090
AS 25.20.110

SPECIFIC FINDINGS NEEDED TO AWARD PHYSICAL CUSTODY OF A CHILD TO A NON-PARENT EVEN WHEN PARENT RETAINS LEGAL CUSTODY.

The court extended a previous holding that required a finding by clear and convincing evidence that a parent is unfit before awarding custody of a child to cases in which an award of physical custody to a non-parent is made even when the parent retains legal custody.

Andrea S. v. David R., 116 P.3d 589 (Alaska 2005)

Legislative review is not recommended.

AS 25.27.080(b)

TRIAL COURT IS AUTHORIZED TO ORDER AN OBLIGOR TO APPLY FOR A PERMANENT FUND DIVIDEND.

A father was ordered to pay child support and, five years later, was in arrears for a significant amount of unpaid support. For three of the five years, the father refused to apply for a permanent fund dividend (PFD) for which he was eligible. The Child Support Enforcement Division petitioned the court for an order requiring the obligor father to apply for his PFD and to apply it to the child support arrearage. The Supreme Court held for the first time that the superior court was authorized to order an obligor to apply for a PFD. The court also found that the petition for the order was consistent with CSED's statutory authority to "take all necessary action permitted by law to enforce child support orders, including petitioning the court for orders to aid in the enforcement of child support."

State, Department of Revenue, Child Support Enforcement Division v. DeLeon, 103 P.3d 897 (Alaska 2004)

Legislative review is not recommended unless the legislature is interested in restricting child support collection options.

AS 28.15.165
AS 28.35.031

RIDING A TOWED SNOWMOBILE CONSTITUTES OPERATING A MOTOR VEHICLE FOR PURPOSE OF ALASKA IMPLIED CONSENT LAWS.

A North Pole police officer observed a snowmobile towing

another snowmobile illegally on the shoulder of an exit from the Richardson Highway. The towed machine would occasionally pull into the traffic lane while being towed. The officer stopped the machines and observed Conkey, the rider of the towed snowmobile, fall after he got off the snowmobile. Apparently, Conkey's machine had run out of gas and the other snowmobile was towing him home. The officer and another officer observed signs of inebriation and a portable breathalyzer disclosed that Conkey had a breath alcohol concentration of .122. Conkey was arrested for driving while intoxicated. Conkey refused to submit to additional breath testing at the police station and his driver's license was subsequently revoked under Alaska's implied consent laws. Conkey argued that the revocation was improper as his snowmobile was not legally a motor vehicle (as it was out of gas and was not capable of moving under its own power) and that he was not operating it (Conkey contended that he was merely a passenger on the snowmobile as he could not influence the speed at which it traveled). The Alaska Supreme Court held that Conkey's license was properly revoked finding that Conkey's snowmobile was designed to be a motor vehicle regardless of the inoperability of the engine at the time of arrest and that Conkey was operating the machine as he could exercise some control over the direction of the vehicle and he would have been in complete control if the tow rope had snapped.

Conkey v. State, 113 P.3d 1235 (Alaska 2005)

Legislative review is not recommended.

AS 28.35.030
AS 12.55.155(c)(21)

AGGRAVATING FACTOR AT SENTENCING -- REPEATED INSTANCES OF CRIMINAL CONDUCT SIMILAR IN NATURE TO THE PRESENT OFFENSE: RELATIONSHIP BETWEEN DRIVING UNDER THE INFLUENCE AND BREATH TEST REFUSAL.

The Alaska Court of Appeals considered the application of an aggravating factor in this case. The aggravating factor enhances a felony sentence when a defendant has engaged in repeated instances of criminal conduct that are similar to the present offense. Although the court found that this factor was correctly applied to Grohs, it noted a particular circumstance when it was not clear if the prior offenses are similar to the present offense. The court stated that the act of refusing a breath test "is obviously distinct from the act of driving under

the influence. A defendant can be guilty of DUI and yet not guilty of breath test refusal -- or vice-versa." The court noted that obviously the legislature believes these offenses to be significantly related as the decision on whether to charge a present offense as a felony requires the consideration of a defendant's prior convictions for DUI and for breath test refusal. But the court apparently found that the application of this same relationship at sentencing is not clear.

Grohs v. State, 118 P.3d 1080 (Alaska App. 2005)

Legislative review is recommended to clarify the application of aggravating factor AS 12.55.155(c)(21) to the offenses of driving under the influence and breath test refusal.

AS 32.05.330

LIQUIDATION OF A PARTNERSHIP UNDER THE UNIFORM PARTNERSHIP ACT.

In a case of first impression involving a lawful dissolution of a partnership, the court held that liquidation of the partnership and distribution of cash assets were not required, allowing a buy out by one partner to occur.

Disotell v. Stiltner, 100 P.3d 890 (Alaska 2004)

Legislative review is recommended to determine whether the judicial declaration is consistent with the statute on policy grounds.

AS 36.25.010
AS 36.25.020

PRIVATE RIGHT OF ACTION IS NOT AVAILABLE TO THIRD PARTY ON A STATE CONTRACT.

A subcontractor was not paid by a contractor hired by a school district to manufacture two homes. The contract expressly exempted the contractor from state bonding requirements and the subcontractor brought suit against the school district. In a case of first impression, the Supreme Court sided with the federal interpretation of an analogous federal Act by declining to read into state law a private right of action against the state for failure to require the contractor to purchase a payment bond, or to verify whether bonding requirements had been met. The court instead suggested that the subcontractor seek damages directly from the contractor.

Imperial Manufacturing Ice Cold Coolers v. Shannon, et. al.,

101 P.3d 627 (Alaska 2004)

Legislative review is not recommended.

AS 37.05.170

A STATE OFFICIAL IS WITHOUT AUTHORITY TO SIGN AN UNQUALIFIED INDEMNITY AGREEMENT UNLESS THERE IS AN EXISTING APPROPRIATION SUFFICIENT TO COVER THE FULL AMOUNT OF ANY POTENTIAL LIABILITY.

The Attorney General's office issued an informal opinion reiterating the advice in two earlier opinions (1992 and 1994) that, unless there is an existing appropriation to cover the state's potential liability, a state official is prohibited from providing indemnification because of the appropriation requirement in art. IX, sec. 13, Constitution of the State of Alaska. The opinion stated, however, that a qualified indemnification may be given in "rare cases where it is absolutely necessary and would be a benefit to the public." A qualified indemnification may be entered into only if made at a high level of state government, such as by a deputy commissioner, and approved by the attorney general or a deputy attorney general. The indemnity agreement must also state that the legislature has "unfettered discretion as to whether to appropriate money" for the purpose of indemnification.

2005 Informal Op. Att'y Gen. (August 2, 2005; File No. 661-05-0132)

Legislative review is not recommended.

AS 39.20.080(a), (b)

SALARY FOR ACTING COMMISSIONERS.

The opinion concluded that a deputy commissioner receiving a salary within the salary range set for deputy commissioners under AS 39.20.080(b) could continue to receive that salary when acting as commissioner, even though the salary set for commissioners under subsection (a) of the same section was lower. Under subsection (b), deputy commissioners are eligible for salaries from Step A through Step F of Range 28, and the deputy's salary at the time was at Step F. However, under subsection (a) as written at the time, commissioners were eligible for a salary only equal to Step E of Range 28. The opinion noted that subsection (a) did not, by its terms,

explicitly indicate that it applied to an employee serving as commissioner in an acting role.

2005 Informal Op. Att'y Gen. (March 1, 2005; File No. 661-04-0367).

Legislative review is recommended if the legislature desires to directly address the salary for personnel serving as acting commissioners.

AS 39.52.110 - AS 39.52.190

ECONOMIC INTERESTS OF AN EMPLOYEE THAT END BEFORE THE EMPLOYEE'S STATE SERVICE BEGINS.

The opinion concluded that the Executive Branch Ethics Act did not preclude former Attorney General Gregg Renkes from participating in the negotiation of contracts with ARCO and BP under the Alaska Stranded Gas Development Act while the former Attorney General was in state service. Although former AG Renkes had worked for the two companies as a consultant prior to beginning state service, that relationship ended when he was appointed Attorney General. Furthermore, former AG Renkes owned no stock in the companies at the time of the opinion. The Executive Branch Ethics Act addresses interests held during state service, not those that were only held prior to state service. Thus, the Act did not prevent the former Attorney General from negotiating with ARCO and BP.

2004 Informal Op. Att'y Gen. (November 8, 2004; File No. 665-05-0090).

Legislative review is not recommended.

AS 39.52.120(a), (b)(1), (b)(3)
AS 39.52.110(b)
AS 39.52.180(a)
AS 39.52.140(a), (b)
AS 39.52.210

SEEKING OTHER EMPLOYMENT WHILE IN STATE SERVICE.

The opinion provided advice to an employee seeking other employment while in state service. The opinion counseled the employee that AS 39.52.120(a) prohibited using "official position for personal gain" and that AS 39.52.120(b)(1) prohibited "seeking other employment ... through the use ... of official position." However, the opinion stated that merely seeking employment with an entity with which one interacted as a state employee, without more, did not violate these provisions.

The opinion counseled the employee that AS 39.52.120(b)(3) prohibited the use of state resources to benefit "personal or financial interests" but that under AS 39.52.110(b), "insignificant" conflicts did not represent the "substantial impropriety" of the sort prohibited by the Act. Thus, with Designated Ethics Supervisor pre-approval, the employee's de minimus use of telephones or e-mail to seek employment would not be prohibited.

The opinion advised the employee that for two years following state employment, AS 39.52.180(a) would prevent the employee from working for compensation on a matter in which the employee participated personally and substantially during the employee's executive tenure. Also, under AS 39.52.140(a), the employee could not use or disclose information gained in the course of official state duties for the employee's benefit if that information has not been disseminated to the public. Moreover, under AS 39.52.140(b), the employee could not use or disclose such information if it is confidential by law.

Finally, the opinion advised the employee to seek clarification of any unclear issues regarding the Executive Branch Ethics Act by filing a notification under AS 39.52.210 with the appropriate authority.

2005 Informal Op. Att'y Gen. (May 25, 2005)

Legislative review is not recommended.

AS 39.52.120(a), (b)
AS 39.52.960
AS 39.52.210

SUPERVISOR AND SUPERVISEE IN A CONJUGAL RELATIONSHIP.

The opinion examined a case in which two state employees were in a supervisor/supervisee relationship and in a conjugal relationship. The supervisor was in charge of scheduling for the cohabitating partner and had participated on an evaluation team that affected the partner's receipt of a promotion.

The opinion advised that under AS 39.52.120(a), the supervisor employee may not "grant unwarranted benefits or treatment for any person." This prevented the supervisor employee from deviating from normal scheduling procedures for the partner for the convenience of their personal relationship.

The opinion observed that in light of AS 39.52.960's definition of "financial interest" and "immediate family member," the supervisor employee had a derivative "financial interest" in the schedule of, employment status of, and receipt of promotion by the partner.

The opinion also observed that under AS 39.52.120(b), the supervisor employee was prohibited from taking or withholding official action to affect a matter touching upon the supervisor's financial interest. Thus, the supervisor could not take or withhold action that might affect the partner, including participation on evaluation teams.

The opinion advised that under AS 39.52.210, the supervisor employee should have disclosed in writing the facts of the relationship.

The opinion concluded that employees' right to be in a conjugal relationship did not give rise to a right to create a situation that potentially or actually violated the Executive Branch Ethics Act. The opinion advised that if the employees were to continue to work in the same location, the supervisor/supervisee relationship would have to end. Otherwise, one of the employees would have to be transferred to a new location or terminated.

2005 Informal Op. Att'y Gen. (March 25, 2005; File No. 663-05-0160)

Legislative review is not recommended.

AS 39.52.120(b)(4)
AS 39.52.110(b)

PERSONAL INVESTMENTS UNDER THE EXECUTIVE BRANCH ETHICS ACT.

The opinion examined the personal investments of then-Acting Deputy Attorney General David Marquez to determine whether the Executive Branch Ethics Act would preclude Mr. Marquez's participation in negotiations with oil companies over a proposed natural gas line based on those investments. Under the Act, AS 39.52.120(b)(4), prohibits officials from taking or withholding action in which the officer has "a personal or financial interest;" however, under AS 39.52.110(b) there is no "substantial impropriety" of the sort prohibited by the Act if the interest is "insignificant."

With regard to discretionary managed brokerage accounts, which included corporate and municipal bond accounts, Mr. Marquez's holdings did not include bonds of any oil companies doing business in Alaska or of any Alaska municipality or other state government, public, or quasi-public entity. Thus, the opinion concluded that these investments did not preclude negotiation activity by Mr. Marquez.

With regard to cash or depository bank accounts, the opinion concluded that such investments did not preclude negotiation activity.

With regard to deferred compensation plan accounts with ARCO/BP and Conoco/Phillips, the level of plan payments received and the rate of return on plan contributions was not tied to the profitability of the companies. Official action in negotiations with companies would not affect the value of plan payments. Thus, the opinion concluded that deferred compensation investments did not preclude negotiation activity.

With regard to mutual fund investments in broadly diversified mutual funds, the opinion stated that although such a fund might invest in the companies in question, an individual's "financial interest" for purposes of the Act was in the shares of the mutual fund itself. At most, an interest in the held companies would be considered de minimis, with the official having little ability to affect the value of the fund shares through official dealings with companies in which the fund was invested. Thus, the opinion concluded that mutual fund investments did not preclude negotiation activity.

2005 Informal Op. Att'y Gen. (March 24, 2005; File No. 663-05-0171).

Legislative review is not recommended.

AS 39.52.180(a), (c)
AS 39.52.140(a), (b)

POST STATE EMPLOYMENT I.

The opinion examined AS 39.52.180(a), which for two years after the end of an executive branch employee's service prevents the employee from working for compensation on a matter in which the employee participated personally and substantially during the employee's executive tenure.

The opinion concluded that this provision prohibited a former

accountant employee from working for a certain federal agency on certain finance-related reports. The prohibited class of reports would include any reports that employee had prepared personally while in executive service. They would also include other reports if the reports had been prepared by someone the employee had personally supervised; if the employee was personally involved in critically analyzing the reports; or if the employee contributed to the reports' accuracy. The opinion stated that the employee could request a waiver of the prohibition under AS 39.52.180(c).

The opinion advised the employee that under AS 39.52.140(a), the employee could not use or disclose information gained in the course of official state duties for the employee's benefit if that information has not been disseminated to the public. The opinion also advised that under AS 39.52.140(b), the employee could not use or disclose such information if it is confidential by law.

2004 Informal Op. Att'y Gen. (August 27, 2004; File No. 663-05-0028).

Legislative review is not recommended.

AS 39.52.180(a)
AS 39.52.140(a)

POST STATE EMPLOYMENT II.

The opinion examined AS 39.52.180(a), which for two years after the end of an executive branch employee's service prevents the employee from working for compensation on a matter in which the employee participated personally and substantially during the employee's executive tenure.

The opinion concluded that this provision did not prohibit a former employee from working for a private firm involved or potentially becoming involved with construction projects for the state. While in executive service, the employee had not been involved with any projects in which the firm had an interest. Also, while in service, the employee had not been involved in the decision to offer or in preparing any project Request For Proposals (RFP) in which the firm might have an interest. Reviewing pre-RFP work for technical errors or content and giving input on the over-all feasibility of projects later culminating in a RFP does not rise to a level of involvement that triggers AS 39.52.180(a)'s prohibition.

The opinion advised the former employee that under

AS 39.52.140(a), the employee could not use or disclose information gained in the course of official state duties for the employee's benefit if that information has not been disseminated to the public.

2005 Informal Op. Att'y Gen. (January 4, 2005; File No. 663-04-0104).

Legislative review is not recommended.

AS 39.52.180(a)
AS 39.52.140(a)

POST STATE EMPLOYMENT III.

The opinion examined AS 39.52.180(a), which for two years after the end of an executive branch employee's service prevents the employee from working for compensation on a matter in which the employee participated personally and substantially during the employee's executive tenure.

The opinion concluded that this provision did not prohibit a former employee from working for a private firm that might become involved with certain projects that were the subject of state Requests for Proposals (RFPs). While in executive service, the employee had no involvement in any of the projects or their RFPs.

The opinion advised the former employee that under AS 39.52.140(a), the employee could not use or disclose information gained in the course of official state duties for the employee's benefit if that information has not been disseminated to the public.

2005 Informal Op. Att'y Gen. (January 4, 2005; File No. 663-05-0097).

Legislative review is not recommended.

AS 39.52.180(a)
AS 39.52.140(a), (b)

POST STATE EMPLOYMENT IV.

The opinion examined AS 39.52.180(a), which for two years after the end of an executive branch employee's service prevents the employee from working for compensation on a matter in which the employee participated personally and substantially during the employee's executive tenure.

The opinion concluded that this provision did not prohibit a

former employee from working on the board of directors of a private firm. The firm had contracted with the employee's governmental unit during the employee's tenure, and the contract had been renewed by the unit during that tenure. However, the employee's involvement with the renewal consisted only of general supervision of employees with more direct involvement in the renewal; performance of ministerial activities not involving the merits of the renewal; and routine processing of documents related to the renewal. This involvement did not trigger AS 39.52.180(a)'s prohibition.

The opinion advised the former employee that under AS 39.52.140(a), the employee could not use or disclose information gained in the course of official state duties for the employee's benefit if that information has not been disseminated to the public. The opinion also advised that under AS 39.52.140(b), the employee could not use or disclose such information if it is confidential by law.

2004 Informal Op. Att'y Gen. (September 9, 2004; File No. 663-05-0029).

Legislative review is not recommended.

AS 39.52.180(a), (b)

POST STATE EMPLOYMENT V.

The opinion examined AS 39.52.180(a), which for two years after the end of an executive branch employee's service prevents the employee from working for compensation on a matter in which the employee participated personally and substantially during the employee's executive tenure.

The opinion concluded that this provision did not prohibit a former employee from working for a non-executive branch state agency regarding a project in which the employee was involved during the employee's executive branch tenure. Under AS 39.52.180(b), the employment prohibition does not apply when the former employee's new employer is also a part of the state.

Moreover, the work that had originally been the subject of the project was not completed when the employee ceased executive branch employment. The follow-on project to complete the work was the subject of a new contract. Work covered by a new contract constitutes a new matter for purposes of determining "personal and substantial

involvement" under AS 39.52.180(a). Because the employee was not involved with the new contract during executive branch tenure, AS 39.52.180(a)'s prohibitions do not apply.

2003 Informal Op. Att'y Gen. (July 18, 2003; File No. 663-04-0009).

Legislative review is not recommended.

AS 39.52.180(a), (c)
AS 39.52.140(a), (b)

POST STATE EMPLOYMENT VI.

The opinion examined AS 39.52.180(a), which for two years after the end of an executive branch employee's service prevents the employee from working for compensation on a matter in which the employee participated personally and substantially during the employee's executive tenure.

The opinion concluded that this provision prohibited a former employee from working for a private firm on a contract with the employee's former department. The contract in question entailed reviewing information concerning a certain report and project.

While in executive service, the employee had been involved in selecting the private firm for an earlier contract having the same scope of work as the present contract. In essence, the present contract was essentially a continuation of the first. The first contract had only been halted because of delays obtaining the information to be reviewed under the contract. The delays had ended, which provided the impetus for the second contract. The opinion noted that when a contract expires and is extended without changing the scope of work, the second contract is the same matter for purposes of determining "personal and substantial involvement" under AS 39.52.180(a). Because the employee had been involved with the old contract during the employee's executive branch tenure, the employee is considered to have been involved with the new contract. Thus, AS 39.52.180(a)'s prohibitions do apply.

The opinion stated that the employee could file a request for a waiver of the prohibition under AS 39.52.180(c).

The opinion advised the employee that under AS 39.52.140(a), the employee could not use or disclose information gained in the course of official state duties for the employee's benefit if that information has not been disseminated to the public. The

opinion also advised that under AS 39.52.140(b), the employee could not use or disclose such information if it is confidential by law.

2005 Informal Op. Att'y Gen. (January 18, 2005; File No. 665-05-0117).

Legislative review is not recommended.

AS 39.52.180(a)
AS 39.52.140(a)

POST STATE EMPLOYMENT VII.

The opinion examined AS 39.52.180(a), which for two years after the end of an executive branch employee's service prevents the employee from working for compensation on a matter in which the employee participated personally and substantially during the employee's executive branch tenure.

The opinion concluded that this provision did not prohibit a former employee from working for a private firm involved with or potentially becoming involved with certain projects, even though the employee had some involvement with them while working in the executive branch.

One of the projects in question had been transferred from the employee's unit to the control of a legally independent government unit. Because the second, separate unit would be in charge of letting any contract regarding the project, AS 39.52.180(a)'s prohibition does not apply to prohibit the employee from working for the firm on the project under such a contract.

Regarding a second project, the employee's involvement had entailed general supervision of other employees without direct involvement by the employee. Thus, AS 39.52.180(a) does not apply to prohibit the employee from working on that project.

On a third project, the employee's involvement had consisted of directing staff to review closely an alternative course of action for completing the project. However, the employee had not been involved in the discretionary exercise of sovereign power or the distribution of state property regarding the project; had not been involved in work that coalesced into a particular contract; and had not been involved in the drafting of or decision to put out for bid the project's Request For Proposals (RFP). Again, AS 39.52.180(a)'s prohibition does

not apply to prevent the employee from working on that project under a contract arising from the RFP.

The opinion advised the former employee that under AS 39.52.140(a), the employee could not use or disclose information gained in the course of official state duties for the employee's benefit if that information has not been disseminated to the public.

2004 Informal Op. Att'y Gen. (January 13, 2004; File No. 665-04-0069).

Legislative review is not recommended.

AS 39.90.100 - 39.90.150

ARBITRATION CLAUSE UNDER A COLLECTIVE BARGAINING AGREEMENT DOES NOT NECESSARILY PRECLUDE A CIVIL SUIT.

An employee was terminated from his job. He submitted a complaint to arbitration under his collective bargaining agreement and filed a state and federal whistleblower act complaint in court. The court allowed him to pursue both remedies. The court held that absent submission of the whistleblower claim to arbitration, the arbitrator lacked jurisdiction to make findings on that claim and therefore had no preclusive effect on a subsequent lawsuit. The court also adopted the view of some of the federal circuits that absent a "clear and unmistakable" waiver to submit statutory rights to arbitration, an arbitration clause would not be interpreted to include such a waiver.

Hammond v. Department of Transportation and Public Facilities, 107 P.3d 871 (Alaska 2005)

Legislative review is not recommended.

AS 40.25.110

REVIEW OF PUBLIC RECORDS FOR PRIVILEGED MATERIAL NOT CHARGEABLE.

The City of Homer charged a fee for public records that included attorney's time spent reviewing public records for privileged material. The court interpreted the statutory search and production terminology, found that the words did not contemplate a privilege review, and disallowed the fee.

Fuller v. City of Homer, 113 P.3d 659 (Alaska 2005)

Legislative review is recommended to determine whether the court's interpretation of statutory terms is consistent with legislative intent.

AS 43.55.016(a)
AS 29.71.030

MUNICIPAL ELECTRICAL AND NATURAL GAS UTILITY IS EXEMPT FROM GAS PRODUCTION SEVERANCE TAX FOR GAS PRODUCED FOR ITS OWN USE.

AS 43.55.016(a) levies a gas production (severance) tax on producers of natural gas. The law exempts from the tax gas "which is exempt from taxation." AS 29.71.030 provides that municipalities are not subject to state taxes unless the law imposing the tax "expressly provides that the municipality is to be assessed or taxed by the particular law." Anchorage Municipal Light & Power (ML&P), a subsidiary of the Municipality of Anchorage, produces natural gas and retains some of the gas to generate electricity for sale to its customers. ML&P pays the tax on the gas that it produces and does not use for generation of electricity. The Department of Natural Resources contended that the gas used to generate electricity for sale to customers should be taxed also. The Alaska Supreme Court found that AS 43.55.016(a) does not "expressly" levy the production tax on municipalities. Although ML&P is using the gas for commercial activities, that use does not justify the imposition of the tax in the face of the exemption provided by AS 29.71.030. The Court stated that the commercial activities argument should be made to the legislature and not the courts.

State v. Municipality of Anchorage, 104 P.3d 120 (Alaska 2004)

Legislative review is recommended if the legislature agrees with the Department of Natural Resources that gas produced and used by a municipality for a commercial purpose should not be exempt from the gas production (severance) tax.

AS 44.25.040

DEFINITION OF "PRIMARY FISH BUYER" FOR PURPOSES OF BONDING AND LIABILITY INCLUDES AUCTION COMPANY IN CERTAIN CIRCUMSTANCES.

The court defined "primary fish buyer" under AS 44.25.040 for

purposes of state licensing and bonding to include an auction company that sold the fish to a third party. An auction company was held to the price set by it for fish ultimately purchased by a third party since the auction company issued a fish buyer ticket and agreed to a price on behalf of a third party. The court reasoned that the public policy underlying the statute was to provide some protection against nonpayment or under-payment and a contract to circumvent this protection as an auctioneer cannot relieve a person of the person's statutory obligations.

Deaver v. The Auction Block Company, 107 P.3d 884 (Alaska 2005)

Legislative review is not recommended.

AS 44.41.035
AS 11.56.760

NO EQUAL PROTECTION PROBLEMS WITH FORMER DNA COLLECTION STATUTE.

The Alaska Court of Appeals found that the legislature had a valid reason for requiring DNA samples from persons convicted of felony crimes against a person as it is likely in most of those crimes that the defendant will be at the scene of the crime and will touch the victim or a weapon. The court further found that the legislature could reasonably conclude that people committing these crimes are more likely to do so in the future. The DNA collection statute has subsequently been amended to require DNA collection from all persons convicted of felonies proscribed in our criminal code and from misdemeanants convicted of crimes against persons. The court of appeals decision did not consider or review the amended statute.

Nason v. State, 102 P.3d 962 (Alaska App. 2004)

Legislative review is not recommended.

AS 45.50.471(b)(14)

CONSUMER PROTECTION ACT CONTROLS ORAL AGREEMENTS FOR COMMERCIAL PARTS AND SERVICES.

A manufacturer of commercial trucks misrepresented the consequences of an oral agreement that it made with a truck parts and services company that applied for the dealership license for the commercial trucks. The Supreme Court found

that the manufacturer violated the Unfair Trade Practices and Consumer Protection Act. Past cases had indicated a willingness only to apply the Act to consumer goods and services.

Western Star Trucks, Inc. v. Big Iron Equipment, Inc., 101 P.3d 1047 (Alaska 2004)

Legislative review is recommended to determine consistency with legislative intent.

AS 46.03.822(a)(4)

LIABILITY OF MANUFACTURER EXTENDED FOR HAZARDOUS SUBSTANCE RELEASE.

The U.S. Court of Appeals for the Ninth Circuit reviewed a lower federal court decision that, among other things, dismissed a portion of a case brought under the arranger liability provisions of AS 46.03.822(a)(4). The provision is the state counterpart to the federal environmental response law ("CERCLA").

The owners of a dry cleaning business sought a contribution from the manufacturer and franchise owner of the dry cleaning equipment for the costs of hazardous substance clean up and remediation incurred as a result of a release of a dry cleaning chemical into the sewer system. The plaintiffs had alleged that the defendant was the corporate successor to the corporation that had designed the layout of and installed dry-cleaning equipment that facilitated the hazardous release giving rise to the case. Since the state statute differed slightly from the federal statute, the Court of Appeals asked for an interpretation of the state statute as it related to arranger liability.

In answering the question, the Supreme Court adopted, for the first time, a standard of arranger liability that is broader than the federal statute upon which the state law was modeled. The court noted that after the Exxon Valdez oil spill, the state statute was amended and intended to be broader. While the court adopted an approach requiring "actual involvement" in the decision to dispose of hazardous waste, that involvement may encompass a determination of how the disposal should occur or in facilitating the disposal. In this case, the manufacturer provided installation and disposal instructions and visited the premises more than once to inspect the operations. While some franchise owners or manufacturers may fall under an express exception under the statute for the

sale of a "useful product," the court declined to apply the exception since the machines and services at issue were specifically designed to release hazardous substances into the sewer system.

Berg v. Popham, et. al., 113 P.3d 604 (Alaska 2005)

Once the Ninth Circuit received from the Alaska Supreme Court an interpretation of the arranger liability provisions, given the Alaska Supreme Court's interpretation of AS 46.03.822(a)(4), the Ninth Circuit held that the plaintiffs had stated a claim on which relief could possibly be granted. Consequently, the Ninth Circuit vacated and remanded that portion of the lower court's decision dismissing the arranger liability claim for failure to state a claim on which relief could be granted.

Berg v. Popham, 412 F.3d 1122 (9th Cir. 2005).

Legislative review is recommended to determine whether the interpretation of the reach of hazardous waste disposal liability to an arranger of a product or service is consistent with legislative intent.

AS 47.24.010(a)(5)

NO DUTY TO PETITION FOR GUARDIANSHIP BY CONSERVATOR.

The Office of Public Advocacy (OPA) was appointed as a conservator for a young woman who was drug addicted and mentally ill. The woman sued OPA, arguing that OPA had a duty to petition for broader guardianship duties to treat her addictions and illness. The court disagreed, holding that a conservator is responsible for management of a person's property and does not have a special duty to petition for guardianship in cases involving mental illness.

Trapp v. State, Office of Public Advocacy, 112 P.3d 668 (Alaska 2005)

Legislative review is not recommended due to the potential for additional tort claims involving the state when conservatorships are undertaken.

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